IN THE

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FOR THE NINTH CIRCUIT

RICK I. RICHMAN,

Appellant and Cross-Appellee,

vs.

TIDWELL,

Appellee and Cross-Appellant,

E. HALLBERG, as Receiver, and FITZPATRICK & YTE and JOHN WHYTE, attorneys for the Receiver,

Appellees.

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lidated Brief of Lyda Tidwell as Cross-Appellant nd as Appellee, in Answer to Opening Brief of ppellant Frederick I. Richman.

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Preliminary Comment.

hould be noted that since Lyda Tidwell, plaintiff court below, appealed only from a relatively small n of the court's order [see Notice of Appeal, R. 197, yda Tidwell's Statement of Points, R. 972], it was nat it would be practical for Lyda Tidwell, as

An order permitting this consolidation was obt
from the United States Court of Appeals for the I
Circuit, based upon the Stipulation of the parties.

Therefore, Lyda Tidwell's Brief is divided into
portions, the first portion constituting her opening br
Cross-Appellant, and the second portion, her rep
respondent.

In view of the fact that there are two separate ap
filed, cross-appellant and respondent, Lyda Tidwell,
for convenience, be generally referred to by her
solely, and appellant and cross-respondent, Frederi
Richman, will be, for convenience, referred to by his
solely.

PENING BRIEF OF CROSS-APPELLANT, LYDA TIDWELL.

Pleadings and Jurisdiction.

is case originally arose out of an action brought yda Tidwell, as plaintiff, against her brother, Fred- I. Richman, and others, as defendants, in the United s District Court for the Southern District of Cali- a. Plaintiff, Lyda Tidwell, brought suit seeking the lution and avoidance of a Declaration of an *inter* Trust, and for a distribution of the assets of the e to the trustors, consisting of herself and her er, Frederick I. Richman. Each was the beneficial r of one-half the assets of said trust. She claimed the trust was voidable because of undue influence fraud in the inception of the trust and sought dam- for fraudulent and improper management, and fur- asked for the removal of Frederick I. Richman as t of the trust. Defendant, Frederick I. Richman, ered, denying the allegations of undue influence and l in the inception of the trust and further denied llegations of fraudulent and improper management. Memorandum of Decision, R. 3-20.]

risdiction is based on the fact that plaintiff, Lyda Tid- is a resident of the State of New Mexico, while de- ant, Frederick I. Richman, and the remaining de- ants are residents of the State of California, and

Jurisdiction is conferred under the provisions of
tion 1291 of the Judicial Code as amended (28 U. S
1291).

Statement of the Case.

The trial court determined that the issues of fraud
undue influence in the inception of the trust would
tried first and separately from the other remaining is
under the provisions of section 42(b) of the Rules
Civil Procedure for the District Courts of the Un
States. [R. 3-4.] After an extended and bitterly
tested trial, which lasted in excess of nineteen (19)
[R. 5], the trial court filed its Memorandum of Deci
on November 30, 1953 [R. 3-20], in favor of I
Tidwell voiding and cancelling the trust and all o
questions and matters were expressly reserved for fur
proceedings. [R. 17.]

On the same day, November 30, 1953, the trial c
signed and filed its order appointing Roy E. Hallber
Receiver, "In the best interests of all the parties and
the protection and preservation of the assets of the for
Richman Trust" [R. 21-24], said receiver being expr
ordered to take possession forthwith of the said a
and manage and operate the same, and that the said
ceiver should not pay any income to either plaintif
defendant Richman without specific order of court.
principal assets consisted of the five apartment ho
mentioned in the court's order. [R. 22.]

Judgment was entered January 22, 1954, in favo
Lyda Tidwell voiding the trust, and in conformance

e receiver operated the former trust properties for a l of three months, from December 1, 1953, to Febru- 8, 1954, at which time plaintiff, Lyda Tidwell, and dant Richman reached a final settlement disposing issues. Said settlement arose by virtue of a letter February 19, 1954, in which defendant offered to is undivided one-half interest in the former trust to plaintiff for the sum of $600,000.00; that plain- Tidwell, as the buyer, would assume possession of aid assets on February 28, 1954, and after payment provisions being made for the payment of the re- 's operating obligations and expenses and fees, the ce remaining under the control of court would be ed equally between the parties. [R. 139-142.] Plain- Tidwell unconditionally accepted said offer by letter February 25, 1954, and assumed possession of the on February 28, 1954. [R. 143-144.]

e Receiver filed his First and Final Report and Peti- for Allowance of Fee to Receiver, on March 18, 1954 5-121], and on the same day, Fitzpatrick & Whyte, John Whyte, attorneys for the receiver, filed their on for Allowance of Fees to Attorneys for Receiver. 8-74.] Said receiver's First and Final Account re- d that he had on hand, after the payment of all obli- ns except his fees and those of his attorneys, the of $20,697.71. [R. 119.] On April 6, 1954, defen- Frederick I. Richman, filed his Objections and An- to report and petition of receiver and his attorney ees [R. 125-144], in which certain objections were

not object to the accuracy of the receiver's report merely pointed out that the trial court would be inv in a division of funds between Lyda Tidwell and erick I. Richman, in accordance with the letter agree of the parties. [R. 145-152.] Lyda Tidwell then on April 12, 1954, her Reply to Objections of Defen Frederick I. Richman [R. 152-156], together with p and authorities in support thereof. [R. 152-156.]

The said petition of the Receiver and his attorneys the objections of Tidwell and Richman are the plea pertaining to the present conflict between the receive his attorney on the one hand, and Frederick I. Rich on the other, and also to the conflict between Lyda well and Frederick I. Richman as to the division o fund remaining after payment therefrom of the fee the receiver and his attorneys. Lyda Tidwell has objected to the accuracy of the receiver's report to the award of reasonable fees to the receiver and h torney, nor has she asked that the receiver be surcha since the receiver did no wrong, and the balanc maining in his hands is sufficient to settle in full a maining disputes between Tidwell and Richman credits and debits, which each claims against the in the final settlement of their dispute and divisi the funds.

The trial court held its hearing, first, on the Rece Account and Report and the issues of an award of re able fees for the receiver and his attorneys. On Jun 1954, stipulations were entered into between Lyda well and Frederick I. Richman, which made a trial o

an order under Local Rule 7 of the United States ct Court for the Southern District of California, rule permits the parties to submit computations on the court's decision prior to the court signing a rder. Defendant Richman made no objection to the ive order proposed by Lyda Tidwell, but seeks relief, rect appeal, from the whole of said order finally l and entered November 19, 1954. [R. 196.]

e defendant, Frederick I. Richman, having appealed the whole of said order, plaintiff, Lyda Tidwell, ap- l from that portion of the order relating to her dis- with the defendant, and which portion of the Order favorable to her insofar as final division of funds the court's control is concerned. [R. 197.]

fendant Richman appealed on December 15, 1954 96], and plaintiff, Lyda Tidwell, appealed on Decem- 0, 1954.

nerally, defendant Richman claims that (1) the court should have disqualified itself from considering f the issues presented here; (2) that, in any event, ial court had no jurisdiction to settle title as between iff and defendant to the funds under the court's ol; (3) that the receiver and his attorney were ded excessive fees by the court; and (4) that, in ng the fund between plaintiff and defendant: (a) rial court should have given Richman a credit for es rendered the trust in November, 1953, at the rate % of the gross receipts for that month, rather than *quantum meruit* rate of 6% allowed by the court;

Mrs. Tidwell, still the trial court erred in its computa
(c) that the trial court erred in failing to credit Ric
with one-half of the rents collected from the trust de
ment houses for the 26th, 27th and 28th days of Febr
1954, which funds were turned over to Mrs. Tidwe
the receiver; (d) that the trial court erred in faili
credit Mr. Richman with one-half of the amount of
cash fund which the receiver turned over to Mrs. Tic
that, although the receiver had not paid certain obliga
incurred during his stewardship, which were later
for by Mrs. Tidwell out of her own funds, nevert
the court erred in allowing Mrs. Tidwell a credi
one-half of these obligations consisting of (e) the ins
tion of catalytic units, (f) real property taxes for
ary and February, 1954, and (g) utility bills for Febr
1954.

Plaintiff Tidwell on the other hand objected to (1
award of agent's fees to Richman for the month o
vember, 1953, and (2) further claimed that in the
settlement between Richman and Tidwell, the court s
have allowed her a credit for Richman's escrow fee
Bureau of Internal Revenue stamps required to be
on Richman's deed of conveyance to her of his on
undivided interest in the real properties of the f
trust, since Mrs. Tidwell paid for those two item
of her own funds.

Specifications of Error.

Lyda Tidwell, as Cross-appellant, urges and relies
three specifications of error, as follows:

ıber, 1953, in the sum of $1,862.60 (one-half of was charged to Lyda Tidwell) or in any sum ɔever.

(a) The court found that Richman was entitled to reasonable fee for services rendered by him as agent f the dissolved trust for the month of November, 953, which reasonable fee was found to be 6% of ross revenues or the sum of $1,862.60, one-half of hich was held to be the obligation of plaintiff, Lyda idwell. [R. 194-195.]

SPECIFICATION OF ERROR No. 2.

trial court erred in failing to credit Lyda Tidwell Richman's share of the balance of the funds for ıan's escrow fees on the sale of his one-half un- d interest of the trust assets. Lyda Tidwell paid ller's escrow fees in the sum of $329.00. [R. 787-799A.] The trial court found that Lyda Tidwell ıot entitled to any credits for expenses incurred by said escrow on behalf of Richman. [R. 195-196.]

SPECIFICATION OF ERROR No. 3.

trial court erred in failing to credit Lyda Tidwell Richman's share of the balance of the funds for ıan's costs for Bureau of Internal Revenue Stamps on his deed of conveyance of his one-half undivided st in the former trust properties. Lyda Tidwell paid ım of $577.50 for the said Internal Revenue stamps her own funds. [R. 799A.] The trial court found

I.

Specification of Error No. 1.

Richman Not Entitled to Credit for Any Services Ren the Trust.

Lyda Tidwell assigns error to the trial court's gra a credit to Frederick I. Richman in the sum of $1,8 out of the balance of the fund for services rendered t trust as agent therefor for the month of November,

In his brief at page 67, Richman even claims tha is entitled to his full agent's fee of ten per cent (1 for the operation of the trust in November, 1953. court did, in fact, give him credit for one-half of a re able fee, which the trial court set at six per cent (6 [R. 194-195.]

Mrs. Tidwell strongly urges that Mr. Richman wa entitled to any credit for fees.

Before arguing the respective alleged specificatio error, a brief review of the pertinent evidence may clarify these issues:

The parties had reached a binding agreement b unqualified acceptance letter of Tidwell and her atto dated February 25, 1954. [R. 143.]

The pertinent provisions of the offer letter February 19, 1954, written by Richman's attorneys approved by him in writing at the bottom thereof 139-142] are as follows:

> (1) Mutual releases by each party to the from the beginning of time to the present.
>
> (2) Both parties to "bear their own expe

(4) "A stipulation shall be entered into that the eceiver be relieved as of five o'clock p. m. February 8, 1954, and whoever buys shall be entitled to all eceipts and shall assume all operating obligations of he Richman Trust from March 1, 1954 on . . ."

(5) "The receiver shall file his report and after he payment and/or provision for all of the receiver's laims and expenses and operating obligations of Richman Trust to February 28, 1954, any funds emaining shall be divided equally between Mrs. Tidvell and Mr. Richman."

(6) "Mrs. Tidwell shall have her election to either uy Mr. Richman's undivided half interest in the ssets of Richman Trust, or to sell her undivided one-alf interest in the assets of Richman Trust for the um of $600,000.00, payable on the following basis:

"(a) $100,000.00 cash shall be paid on February 26, 1954 . . . to the other . . ."

"(b) $500,000.00 shall be paid through escrow . . . on or before May 1, 1954."

(7) "All parties will execute whatever is necessary o carry out the terms of this arrangement."

da Tidwell, having accepted the offer of Richman to is "undivided half interest in the assets of the Rich-Trust," Lyda Tidwell paid Richman the $100,000.00 ly and the parties went in to escrow and entered into crow agreement for the purpose of executing the act of purchase. [Escrow Instructions, R. 799-800.]

must be recalled that the court stated Richman "had ly, and by over-weaning and deceptive means, ob-

we realize that the 10% fee Richman seeks for the m
of November, 1953, amounts to $3,104.33, and whe
further realize that it was not by any means a full
job, as shown by the receiver's testimony and by
man's testimony as to his law practice and many
interests. [R. 528, 713-715, 731-732.] The
awarded the receiver a fee of 6% of the gross in
for the period of the receivership [R. 183], and Rich
has charged that the same is excessive and an abus
discretion, although apparently the receiver did his j
well or better than Richman. The court states tha
(10) percent is an excessive fee [R. 187] and that a
fee "would have been indicated." [R. 183.] The
then awards Richman a fee amounting to 6% of
revenues, or the sum of $1,862.60, of which Mrs. Ti
must pay one-half. [R. 194-195.]

The trial court correctly pointed out in its memora
decision that the trust had been voided and ther
Richman was not entitled to the amount provided f
said Trust Agreement. [R. 183.] The judgment di
course, void and set aside and cancel the trust [R. 41
and the court was perfectly correct in holding that i
not bound by the terms of the Trust in setting a fe
Mr. Richman. Satisfaction of judgment was enter
said case [R. 800], and the judgment voiding the
therefore became final.

However, Mrs. Tidwell objects to the award of any
to Mr. Richman for the month of November, 1953
must be noted that the Trust began November 1,
and that Richman, as agent, had received approxim

s in fees. These issues (other than fraud and undue nce in the execution of the trust) had not been tried the court gave its judgment voiding the Trust. 3-4.] The judgment specifically reserved to Mrs. ell the right to claim "such additional assets, if any, aintiff (Mrs. Tidwell) may be adjudged entitled to an accounting; . . ." and the court reserved juris- n to make final disposition of "other issues still ng. . . ." [R. 43-44.]

s. Tidwell had a legitimate claim for the surcharging r. Richman with respect to excessive fees charged her e past. But when the settlement was made, each , as a term of the letter agreement, released the from any and all claims from the beginning of time present. Also, the letter offer of February 19, 1954, : "2. Both parties shall bear their own expenses." 40.]

the time the parties entered into the letter agree- the trust was voided. Richman's claim for reason- fees for services rendered could, of course, only be against Mrs. Tidwell and himself, because his ser- as agent, were only of benefit to them as the owners ie trust properties. The judgment, therefore, left nan in the position of a claimant against Mrs. Tid- for the reasonable value of his services. But, Mrs. ell had many claims against Mr. Richman. Both es gave up these claims.

. Richman's offer, must be most strictly construed st him in the event of ambiguity, since he and his

mention paying any of Richman's claims. It would adding insult to injury to award Richman one cent m in fees in this case. It certainly was not the inten the parties that he be so enriched. Mr. Richman test several times that the net worth of the trust was $1, 000. If that be true, then plaintiff, in paying $600 for Mr. Richman's interest, was in no way compens for the loss she sustained over a period of eight y in the payment of exorbitant fees. Looking at the l agreement as a whole, it is obvious that each party m bear any expenses sustained in connection with the t Any services which Richman performed and was compensated for, was his "own expense."

The letter offer of February 19, 1954, was prep and signed by both Mr. Richman and his attorney and m be most strictly construed against him.

Williston On Contracts, Revised Edition, Volum Section 37, Page 100, states as follows:

> "* * * (a) Ambiguous words in an obliga should be interpreted most strongly against the p who used them."

And again in Volume 3 of Williston, *supra,* Se 620, Page 1788:

> "Since one who speaks or writes, can by exac of expression more exactly prevent mistakes in m ing, than one with whom he is dealing, doubts ar from ambiguity of language are resolved in f of the latter;"

See *Restatement of Contracts,* Section 236(d).

II.

Specification of Errors 2 and 3.

Tidwell Entitled to Credit for Escrow Fees and Revenue Stamps Paid by Her on Behalf of Richman.

da Tidwell assigns error to the trial court's failure to her credit out of the balance of the fund for escrow in the sum of $329.00 and revenue stamps in the nt of $577.50 paid by her on behalf of Richman in scrow held at the California Bank for the purpose of ting the letter agreement.

order to distribute the money which the court had its control, it became necessary for it to interpret tter agreement of the parties, the escrow instructions, ther evidence submitted to it.

hen the parties appeared at escrow, Richman insisted the escrow instructions provide that the buyer (Mrs. ell) pay the seller's as well as the buyer's escrow fees hat the buyer pay for the Internal Revenue Stamps placed on the deed of conveyance. The escrow com- is hardly the place to argue such points. Thus, the w instructions provide for payment of those two by the buyer [799A]. However, immediately after provisions appears the following:

"These instructions are not intended to and do not amend, alter, modify or supersede any agreement outside of escrow between F. I. Richman and me and with which agreement California Bank is not to be concerned." [R. 799A.]

agreement means that the person selling is to "net" sum of $600,000, and therefore, the buyer is to pay expenses incident to the sale. Agreements for the sal property always provide that a purchaser shall pa certain sum of money as and for the purchase price deposit a portion thereof in escrow or pay the same side of escrow directly to the seller for the purpose binding the agreement. Yet the seller always expect pay his share of the escrow expenses and all the sel costs of sale.

And, further, the letter agreement specifically st that:

> "Both parties shall bear their own expens [R. 140.]

Furthermore, although the subjects of payment of crow fees and revenue stamps were not specifically m tioned in the letter agreement, still the usual practice custom with respect to the same were an integral of the letter agreement. It was said in *King v. Sta* 32 Cal. 2d 584, 197 P. 2d 321, that:

> "Equity does not require that all the terms conditions of the proposed agreement be set fort the contract. The usual and reasonable condit of such a contract are, in the contemplation of parties, a part of their agreement. In the abs of express conditions, custom determines incid

(29 P. 2d 196); Wagner v. Eustathiev, 169 Cal. 663, 666 (147 P. 561); Bisno v. Herzbery, 75 C. A. (2d) 235, 241 (170 P. 2d 973); O'Donnell v. Luther, 68 Cal. App. 2d 376, 383 (156 P. 2d 958).)" (Italics ours.) (Pp. 588-589.)

herefore, the letter agreement actually provided that eller (Richman) would pay his share of the escrow and the revenue stamps on the deed of conveyance h are the seller's usual expenses.

the case of *King v. Stanley, supra,* the seller argued the escrow instructions pertaining to her furnishing icy of title insurance added a provision not contained e original agreement. But the court held that it was ed in the original agreement (by custom) that she ld furnish a policy of title insurance.

early, there can be no doubt as to the meaning of offer of February 19, 1954, with respect to the re- sibility for the seller's escrow fees and internal reve- stamps. There is no ambiguity involved here as to issue. Richman apparently argues that the escrow uctions superseded the original contract of purchase, that the seller's escrow fees and internal revenue ps should not be paid by him because the escrow uctions specifically state that the buyer shall pay ame. [R. 800.]

wording of escrow instructions. Both parties were
tected by the typewritten insertion of the following wo

> *"These instructions are not intended to and do*
> *amend, alter, modify or supersede any agree*
> *outside of escrow between F. I. Richman and*
> *(Lyda Tidwell) and with which agreement Califo*
> *Bank is not to be concerned."* [R. 799A.]

In other words, in this particular case, the pa
agreed, that the contract of purchase as arrived at by
interchange of the letters of February 19, 1954
February 25, 1954, was not to be in any manner affe
by the signing of escrow instructions.

It very often happens that parties may enter int
involved agreement of purchase and sale and then go
escrow and file escrow instructions. If the escrow
structions are inconsistent with the prior written ag
ment, the question arises as to which is to control.
is a question of interpretation and the prior agree
and the escrow instructions must be read together.
the escrow instructions specifically state that the
agreement is the controlling one, then, of course, the
agreement controls and not the escrow instructions.
King v. Stanley, supra, the court stated that escrow
structions which are merely customary and expected o
tions to the escrow company do not take the place o
prior written agreement but merely carry it into e

that they refer to the same sale, the two instru- must be construed together, under Civil Code 1642, certain the whole contract between the parties.

Womble v. Wilbur, 3 Cal. App. 527, 86 Pac. 921, held that where parties entered into a written agree- and in pursuance thereof entered into an escrow eby certain instructions were given to the escrow any, in case of any inconsistency, it is a question terpretation of contracts and the surrounding cir- tances as to whether the former agreement or the w instructions controlled. The court points out he parties can agree that the previous written agree- is not to be superseded by any escrow instructions.

r the reasons hereinabove stated, it is respectfully itted that the trial court erred in granting an agent's o Richman for the month of November, 1953, and iling to surcharge Richman's share of the fund for scrow fees in the sum of $329.00 and in the further of $577.50 for Internal Revenue Stamps, the latter tems having been paid by Mrs. Tidwell.

Considerable time was expended in the trial of th ceiver's accounting and the issues pertaining to his and those of his attorney. Although counsel for Ti were in attendance at the trial, they made it clear t court that they did not question these issues and all remained to be done, insofar as the Receiver was cerned, was to award him a reasonable fee [R. and the record shows that counsel for Lyda Tidwe not participate in these issues.

Nowhere does the record show that the receiver to account properly for the funds received by him i administration of the trust, nor does the record show the receivership lost any money or that it failed to ma the apartment houses correctly.

The trial court permitted the receiver to reim himself for the sum of $89.20 for copies of depos paid by him. [Order of Court, R. 195.] These copies of the deposition of the receiver [R. 871 and his attorney. [R. 922-968.] Both of these de tions were taken by Joseph Enright and were used introduced into evidence in the hearing between th ceiver and Richman. Since the Order of the ordered the receiver to reimburse himself from the remaining in his hands, Lyda Tidwell paid one-ha those expenses. Tidwell believes that the receiver i titled to be reimbursed for those expenses, but onl of Richman's share of the funds in the receiver's h

Likewise, with reference to costs on appeal, it

I.

Had Jurisdiction to Determine Respective ights of Lyda Tidwell and Frederick I. Rich- an to Balance of Funds in Receiver's Hands.

ler "Specification of Error 1" Richman argues in his g brief that the trial court had no jurisdiction to the dispute between Richman and Tidwell as to the e of the funds remaining in the Receiver's hands man's Op. Br. pp. 49-54); however, he cites no ity for the proposition.

trial court explains in its Order *In Re* Settlement Receiver's accounts that it retained jurisdiction, the dismissal of Tidwell's suit against Richman, e purposes of settling the accounts of the receiver, the fees of the receiver and his attorney and dis- of any balance of the funds remaining. [R. 192.]

trial court's procedure was undoubtedly correct.

Pacific Bank v. Madera Fruit, etc. Co., 124 Cal. 7 Pac. 462, plaintiff dismissed suit after a receiver een appointed and after the receiver had taken pos- n of certain assets. Thereafter, the receiver filed count and petition and asked the court to "settle me, fix his compensation, et cetera." Plaintiff then motion to dismiss the account and petition on the d that the court had lost jurisdiction. However, the n was overruled and this ruling was affirmed on ap- The decision of the court notes that not only does urt retain jurisdiction to settle the receiver's ac-

The *Pacific Bank* case also states, at page 527:

"* * * If the court below lost jurisdiction c case by virtue of the dismissal so that it coul settle the accounts of the receiver, *nor make disposition of the funds in his hands, how woul account be settled or the funds disposed of?* money on hand and collected by the receiver contemplation of law in the hands of the cou be disposed of as the law directs." (Emphasis c

And,

"If the court in which the receiver was appo cannot, after the dismissal of the case, settle an just the accounts of the receiver, to what jur tion will he resort? The dismissal of the case the end of it as between the parties, but *we thin court still retained the power to settle the acc of its receiver and to direct the application o funds in his hands.*" (P. 527.) (Emphasis c

It is clear that the receiver is holding funds for dis at the direction of the court. In *Garniss v. Sup Court,* 88 Cal. 413, 417, 26 Pac. 351, 417, the stated, quoting from Beach on Receivers, Section

"'Though a receiver may be, and general appointed upon the application of one of the p interested in the property which he is to preserv holding is not merely for the benefit of such or of any other party; *it is the holding of the for the equal benefit of all persons who may be adjudged by the court to have rights in it.*'" phasis ours.)

n his hands as receiver until discharged by the ourt."

the same effect, see *Ireland v. Nichols,* 40 How. Pr. *Whiteside v. Pendergast,* 2 Barb. Ch. 471.

II.

to Richman's Specifications of Error 2, 3 and 4.

der Richman's "Specifications of Error 2, 3, and 4" 4-59] a number of points are apparently made, and e discussed in the order raised by him.

harging Receiver's Fund With Real Property Taxes for the Months of January and February, 1954.

e trial court found that the receiver, having turned his records to Lyda Tidwell on February 28, 1954, ot pay certain obligations during his administration, ne of these was the real property taxes for the s of January and February, 1954, in the sum of 2.77 [R. 193] and the court held that Lyda Tidwell entitled to a credit of one-half that amount, or 5.38. [R. 195.]

arly the agreement of the parties was that the ating obligations" of the receivership up to Feb- 28, 1954, would be borne by the parties equally. offer letter of February 19, 1954, stated that the n buying would "assume all operating obligations e Richman Trust from March 1, 1954 on . . ." again the offer further stated that "after the pay-

The only question remaining is whether real pro taxes constitute "operating obligations." There ca no question but that real property taxes are the essence of "operating obligations" in a business de to the operation of apartment houses for profit. I been specifically held that "operating obligations o penses" include taxes.

> *Schmidt v. Louisville C & L Ry. Co.,* 84 S 314, 315, 119 Ky. 287;
>
> *Michigan Public Utilities Com. v. Michigan Telephone Co.,* 200 N. W. 749, 228 Mich.
>
> *Fleischer v. Pelton Steel Co.,* 198 N. W. 447, 183 Wis. 151.

Clearly, there can be no doubt as to the meaning c offer of February 19, 1954, with respect to the re sibility for real property taxes up to February 28, Richman apparently argues that the escrow instruc superseded the original contract of purchase, and tha taxes should not be pro rated because the escrow ins tions specifically state that taxes shall not be pro in escrow. [R. 800.]

But this overlooks the express provision in the es instructions to the effect that they shall not supe alter or amend the agreement between the parties

The discussion hereinbefore had under paragraph the argument in the cross-appellant's portion of this discusses fully the effect of the escrow instructions the same is incorporated herein at this point by refe

d into with respect to all matters except as to the tion of rents. Mr. Enright argued that if the court as a matter of law there was to be no pro-ration ts, then no factual issue would be left to try. [R. 12.] The trial court so understood also because urt states that the parties may file a stipulation on ebruary and March, 1954, rents. Then the court ounsel,

"Is there any element about which we have to take ral evidence?"

Mr. Enright, counsel for Mr. Richman, replies:

"None, in my opinion." [R. 792.]

Robert Powsner, of Martin, Hahn & Camusi, rep-ed Mrs. Tidwell at the pre-trial hearing. He re-d a stipulation as to the issues urged on behalf of Tidwell. Mr. Powsner stated, among other things:

"There are the real property taxes on the apart-ment houses, which Mrs. Tidwell paid out of her ersonal funds for the first six months of 1954. t is her contention that there should be a pro ration ade, so that the first two months' worth of those axes should be reimbursed to her out of the receiver's unds. That the first third would be $4,952.77." R. 785.]

ew moments later Mr. Powsner stated:

"For instance, if Mr. Enright will stipulate Mrs. idwell paid for the taxes, we don't have to intro-uce evidence she did so, and so on and so forth. And

Several minutes later, the record reveals that M right stated:

> "O. K. now, the amount of revenue stan think, is the only remaining one." [R. 790.]

B. Utility Bills for Month of February, 1954, Were erly Held to Be an Operating Obligation for Month.

The court found that Lyda Tidwell was entitle credit from the balance of the funds in the receiver's for one-half of the amount of the February utilit which she paid for personally after assuming poss of the apartment houses on February 28, 1954, p. m. One-half of the amount paid by her for sai was found to be the sum of $938.75. [R. 195.]

It is difficult to understand why Mr. Richman dispute this item. Certainly, utility bills for the apar houses for the month of February, 1954, were "ope obligations" of the receivership. In the operati apartment houses for profit, utilities are a nec expense item and one of the most basic items of oper

All the arguments above stated in favor of all a credit to Mrs. Tidwell for real property taxes equally as well to allowing her a credit for the utilit

If Mrs. Tidwell is denied this credit, then the offer of February 19, 1954, is meaningless. Also, in th stance. Richman may not use the escrow instructi argue that the original letter agreement was in altered by the escrow instructions, since the latte cifically state that they are not intended to so al

nman also argues that there was no evidence before urt to support the credit to Mrs. Tidwell for pay- of the utility bills. Under the subject of real prop- axes, above, there has already been quoted from the al hearing certain colloquies between court and l which demonstrate that the parties, as well as ial court, assumed that the issues with respect to bills had been stipulated.

addition, the following appears to have occurred at ne 21st pre-trial hearing:

"Mr. Powsner: And will you stipulate Mrs. Tid- ell (578) paid out of her personal funds charges or utilities for the five apartment houses for portions f February in the amount of $1,877.50.

Mr. Enright: The amount, I am sure, is less than at amount. And if we can stipulate on all of the emaining, for the record. I may be willing to ipulate on that one, also.

The Court: If you are not, it is the sort of matter at is susceptible of such easy proof that you can oth probably check your figures.

Mr. Powsner: I think you have five packets f utility bills.

Mr. Enright: I will be willing to submit it on ese five packets, if that is your proof.

Mr. Powsner: I haven't looked at the packets.

Mr. Enright: There they are (indicating). Mr. amusi handed it to me.

case for the utility bills. I understand in thos
it is shown payment in excess of $1,877.50, a
excess would represent March payment, but
are $1,877.50 relating to February utility pay

However, I find myself in the somewhat aw
position that I haven't examined personally
of the items of debt here. Since I haven't exa
those utility bills, we are not willing to rely on
solely for our proof as to this matter.

But I am willing to stipulate they go into ev
for whatever weight they have, and if we
necessary that we be allowed to introduce
evidence on that subject.

Mr. Enright: I will stipulate they go int
dence, that is, the memorandum and the bill
have there.

Mr. Powsner: I am speaking of the utility

Mr. Enright: The five utility bills for th
apartment houses.

Mr. Powsner: That is right.

The Court: Does that stipulation includ
proposition that Mrs. Tidwell paid those bil
of her personal funds?

Mr. Enright: Yes."

Then, on the following page, appears Mr. En
statement: "O. K. now, the amount of revenue st
I think, is the only remaining one." [R. 790.]

Lyda Tidwell was handicapped at the pre-trial h
by the fact that William P. Camusi, her counsel wh
handled the litigation was unable to attend, and

gh the stipulations may not have been in the best m, there was no doubt as to their meaning.

ıman argues that the court did not take evidence endered its decision in a summary fashion. But, been held that if the trial court ended the trial and ıced its decision in a somewhat summary manner, ıatter cannot be reviewed on appeal if the party no objection or failed to take exception thereto. *ıon v. Benjamin,* 75 F. 2d 564, Cert. Den. 295 U. , 79 L. Ed. 1694, 55 S. Ct. 831.)

ections to the judgment or decree, which might have ıet, if made below, are not open to review on appeal.

National Biscuit Co. v. Litsky, 22 F. 2d 939, 56 A. L. R. 853;

Asheville Const. Co. v. Southern Ry. Co., 19 F. 2d 32;

Neil Bros. Grain Co. v. Hartford Fire Ins. Co., 1 F. 2d 904.

as been held that where judgment was excessive on eory of recovery adopted by the trial court, it was lant's duty to apply there for the correction of any e in calculation. (*Border National Bank of Eagle Tex. v. American Nat. Bank of San Francisco,* 282 3, writ of error dismissed and certiorari denied, 260 701, 732, 67 L. Ed. 471, 43 S. Ct. 96.)

l this rule applies to decrees in equity.

Mauro v. Rodriguez, 135 F. 2d 555.

C. Credit in Favor of Tidwell for One-half Amou Catalytic Units.

The court found that Lyda Tidwell was entit one-half of the cost of the Catalytic Units paid b said one-half amounting to $1,300.00. [R. 195.] court indicated in its memorandum decision that the

> "were acquired by the Receiver during the of his receivership but in doing so, he merely c out a plan which had been put in motion by defe These units were assets of the trust which, und terms of the letter agreement, were sold to pla The obligation to pay is the obligation of th ceiver, as the Receiver incurred the expenses c the administration of his Trust and plaintif not a party to the purchase." [R. 185.]

The reasoning of the trial court is certainly in this respect. The letter offer does not specifically this item, it would be a fair interpretation that Ric and Tidwell each pay one-half the cost.

Richman had originally contracted for installati so-called Oxyaire or Catalytic Units at the Oliver well and Canterbury Apartments. However, onl contract for the installation of the Catalytic Unit Canterbury Apartments was placed in evidence. 801-803.] This contract was accepted by Mr. Ric as agent for the Trust on October 23, 1953, some 38 before he was relieved of the management of the by the receiver. The cost of these units became an gation of the Trust at the time they were order Richman, actually. Then the contracts were con

Catalytic Units were actually installed during the 's tenure of office. [R. 88.] The testimony during the hearing questioning the receiver's ship is replete with evidence covering the Catalytic Richman attempted to prove, and did argue, receiver was negligent in the handling of the The receiver apparently retained the approved or the Catalytic Units on December 7 or 8 when re sent to him by Mr. Richman [R. 648], and iver did not send them to the contractor for in- n purposes until January 22, 1954. [R. 646.] ıtly, the contractor could have installed the equip- December, 1953, but when he finally received s late in February, he was then short of certain materials. [R. 703-704.]

rently, considerable delay was involved because was given by the Air Pollution District on Jan- th concerning excessive discharge of smoke. [R. 1.] A criminal complaint was then filed against hman charging him with a violation of the Health ety Code of the State of California [R. 544] and g that he attend a hearing on February 1, 1955. .]

ugh the Air Pollution District had given approval allation not later than December 10, 1954 [R.], the installation was not ordered until Febru- 954. [R. 548.] There is also evidence that one n, Richman's former bookkeeper, who had been by the receiver [R. 405-406], gave orders to the

Whyte, attorney for the receiver, testified that he
the receiver that the contracts were valid and bindi
should be carried out. [R. 556-557.]

Mr. Richman urges that the Catalytic Units
two apartment houses were granted permits fo
operation on March 9, 1954, and June 2, 1954,
tively [R. 805] and that the obligation to pay fo
under the contracts did not arise until the said
were granted, and that they were, therefore, obli
arising after February 28, 1954. However, only t
tract with respect to the Canterbury Apartmen
placed in evidence. [R. 801-803.]

The court found that the Catalytic Units were a
gation of the receiver. This was a finding of fact
as a conclusion of law. There was more than su
evidence to support this finding and unless clearly
ous, it is not subject to reversal on appeal.

United States v. United States Gypsum C
U. S. 364, 394-395, 68 S. Ct. 525, 92
746.

**D. Failure of Trial Court to Surcharge Tidwell for
of February 26, 27, and 28, 1954, Not Error.**

The court found that Richman was not entitled to
for any rents collected by Mrs. Tidwell. [R. 196.]
refers to the rents which were collected on Februa
27, and 28, 1954, by the apartment house manage
turned over to Mrs. Tidwell at 5 p. m. on Februa
1954.

It is important to note that the parties signed a s

nd now under the control of the receiver," and, he stipulation states: "excepting funds in bank and he control of said receiver."

e phrases were interpreted by the receiver and his y to mean that he was only to keep money in any ccount under his control. [R. 759.] Richman that the phrase in question means "money in bank er the control of the receiver." However, the appears twice in the stipulation and in both cases rase appears in the conjunctive and not the dis- e. The phrase also appears twice in the order t of February 26, 1954, and is identically written nes as "money in bank and under the control of the ." [R. 56.]

ould be noted that the receiver did not receive l notice of the termination of his stewardship until evening, February 26. [R. 418.] The receiver, of did not know what or how much rent money was the tenants on February 26, 27 and 28, 1954. 5.] The receiver testified that the Western Arms e Canterbury Apartments house managers pre- to make collections on week ends and these were ed the following week. [R. 758.] In this par- instance, these questioned rents could not be de- until Monday, March 1, 1954. The finding that idwell is entitled to keep these funds as her personal an be supported on several theories. The court in norandum Decision points out that the letter agree- the parties was to the effect that Mrs. Tidwell was

[R. 184-185.] The court also states, "It appe
the various rents collected belong to plaintiff beca
were rentals which were being paid in advance
cupancy during the term of her ownership of the
ties."

These questioned rentals total $1,290.59. [R
But counsel for Mrs. Tidwell argued that if Mr. F
wished to claim one-half of those rents, then Mrs.
could claim that she should receive credit in the
$4,499.29, which were rentals for the month of
1954, but which rentals were collected in Februar
by the receiver. [R. 790.] The receiver accou
these rentals, and Mr. Richman has thus benefite
they are a part of the balance remaining in the r
hands. Mr. Enright argued at the pre-trial hear
if the court ruled as a matter of law that rents
not be pro rated, then it would be unnecessary
evidence on the amount of March rents which M
well claimed was collected by the receiver in F
1954. The court said it would examine the evid
that issue and that the matter could be argued by
at the following hearing to be set for oral argum
810-812], and that the court's ruling might forec
taking of evidence on that issue. [R. 815.] Th
in effect, ruled that Mrs. Tidwell was not entitl
credit for the March rents actually collected and d
by the receiver in February. [Order *in re* Set

is matter need be retried, Mrs. Tidwell would be
l to a ruling as to whether she herself has a right
the March rents collected in February by the re-
If she has sole rights to such items, then a further
ting is necessary to introduce evidence on that

al Court Did Not Err in Holding Mrs. Tidwell Entitled to Petty Cash Fund.

court found that Mr. Richman was not entitled
part of the petty cash fund of which Mrs. Tidwell
d possession on February 28, 1954. The stipu-
and order of the court, both of February 26, 1954,
ussed in subparagraph D above, clearly show the
of the parties that Mrs. Tidwell was to assume
ion of the petty cash fund. This petty cash fund
existence when the receiver assumed his steward-
The receiver's schedule of receipts and disburse-
reflect a petty cash fund in the amount of $785.00
November 30, 1953. [R. 104.] Clearly, the petty
und was an asset of the Richman Trust.

s Memorandum Decision, the trial court reasoned
rs. Tidwell had *"purchased all of defendant Rich-
interest in that Trust and that includes the petty
und which existed simply as an operating incident
h individual apartment house."* [R. 185.] Mr.

III.

Specification of Error 8—Accounting.

Under Specification of Error 8, on page 66 o
Richman's Opening Brief, he apparently also make
tain other claims against Mrs. Tidwell as follows:

A. Compensation Insurance Refund.

Richman argues that he is entitled to a cred
$158.00 compensation insurance refund which wa
the Trust at the time the receiver surrendered poss
of the assets to Mrs. Tidwell. But here again any
refund was an asset of the trust and the whole in
in the same passed to Mrs. Tidwell when he so
one-half undivided interest to Mrs. Tidwell. Appa
Mr. Richman wants to pro rate when it involves a
item now in the possession of Mrs. Tidwell, but h
not want to pro rate any of the operating oblig
which were incurred prior to March 1, 1954, in
cases where the receiver failed to pay for the sam
Mrs. Tidwell was thereafter forced to pay those
in full from her own separate funds.

All the arguments hereinabove advanced with r
to the petty cash fund also apply here.

B. Richman's Fee of 10% as Agent for November,

Mr. Richman claims he is entitled to his full ten pe
(10%) fee (based on gross receipts) for the mo

l argument and the same is incorporated by refer-
ierein at this point.

ice it to say here that *Richman had released Mrs.*
ll of any and all claims which he had against her.
er than that, his letter offer of February 19, 1954,
ed that *each* was to bear his own expenses. It
be manifest injustice to permit him to collect a
r services rendered after the parties had executed
l releases in each other's favor.

istake in Mathematical Computation of Order In Re ttlement of Receiver's Account, Fees and Distribution Funds in Hands of Receiver.

Richman points out at pages 58 and 59 of his
ng Brief that the mathematical computation of the
s order is incorrect with respect to the credit
ed him because of the receiver's payment of the
n mortgage payment. It is true that the computa-
vas incorrectly made to his disadvantage. *How-*
he does *not* point out that the *same* mistake was
with respect to the credits to which Mrs. Tidwell
itled. The result of these errors, which were com-
l by the writer in the preparation of the order, was
ard Mrs. Tidwell $1,340.49 *less* than the sum to
she was entitled. Conversely, Richman was awarded
ame amount in excess of the sum to which he was

Conclusion.

It is respectfully submitted that for the reasons he
above stated, the order of the court settling the Ac
of the receiver, awarding fees, and distributing the
ance of funds is substantially correct and shoul
affirmed with the exception that the mathematical e
committed therein should be corrected by leave of
court, and appellant Richman should be denied any c
whatsoever for management fees, and cross-appe
Lyda Tidwell, should be allowed a credit for the es
costs and charges properly chargeable to appellant
man as the seller, but which were, in fact, paid by
Tidwell from her own personal funds.

Respectfully submitted,

MARTIN, HAHN & CAMUSI,

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Lyda Tidwell.